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Supreme Court, U.S.
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No. 08- 08-101 MAY 13 2008

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IN THE

Supreme Court of the United States

ELMER VAN GORDER,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit improperly and erroneously determined the jury question of "reasonableness" with regards to railroad equipment safety inspections pursuant to the Federal Employers' Liability Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated December 11, 2007, is officially reported at 509 F.3d 265, and is reproduced at Appendix A.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan at Detroit, dated September 27, 2006, is unofficially reported at 2006 U.S. Dist. LEXIS 70181, and is reproduced at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on December 11, 2007. Petitioner filed a timely Petition for Rehearing En Banc in the lower court and the lower court denied said petition on February 20, 2008 (Appendix C). This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51 *et seq.*

28 U.S.C. § 2101(c)

28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

Petitioner, Elmer Van Gorder, commenced this action, in the U.S. District Court for the Eastern District of Michigan Southern Division, against Defendant, Grand Trunk Western Railroad, under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* for injuries sustained during the course of his employment.

Petitioner was employed by Defendant, Grand Trunk, as a carman working out of Defendant's Flint Yard. Petitioner's accident occurred on October 17, 2003, when, in the course of his duties, he was required to place bridge plates between bi-level cars and subsequently, close the door of the railcars, which had been delivered to the loading dock. When Petitioner attempted to close the clamshell doors of bi-level car, TTGX985596, the door suddenly jammed and stopped and as a result, Petitioner sustained serious and painful injuries.

Following his accident, Petitioner reported the incident to the foreman. Subsequently, a mechanical inspection of the railcar was completed by Defendant's management employees, Robert F. Miller, Car Foreman, John P. Jaques, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey and Risk Mitigation Officer David Cromie. The inspection revealed that the canopy bolt on the top of the cars AR door was worn and defective. This defective bolt caused the door to become stuck during closing.

Prior to Petitioner's accident, Defendant conducted two separate inspections of the railcar. However, Defendant did not discover the defective bolt during either inspection. Following Petitioner's accident, a more thorough inspection of the railcar was conducted. This more thorough inspection involved both opening and closing the doors and through this inspection Defendant found that the canopy bolt was worn and defective.

Petitioner commenced the present action on January 13, 2005, on the basis that Defendant failed to provide him a safe place to work under the FELA. On November 30, 2005, Defendant filed a Motion for Summary Judgment, based on the alleged lack of actual or constructive notice of the defective condition of the clamshell door.

In response to the Motion for Summary Judgment, Petitioner submitted his own sworn testimony as to the occurrences on the day of the accident, and his experiences performing safety inspections as a long time railroad employee. This included sworn testimony that when he had previously performed said inspections he would open and close the doors, thereby, discovering any defects. Petitioner also submitted the sworn expert affidavit of Michael Micek, a former governmental inspector and equipment supervisor for the Federal Railroad Administration (hereinafter "FRA"). Mr. Micek's sworn affidavit indicates that FRA rules and regulations regarding the inspection of equipment require that a car cannot be put into service unless it is 100% defect free; and that had Defendant conducted a thorough and proper inspection of the railcar, the defective and worn bolt would have been discovered prior to Petitioner's injury.

The District Court granted Defendant's Motion for Summary Judgment. In its decision, the District Court held that Petitioner failed to establish a claim of negligence and specifically, had not set forth a specific industry standard as to railcar inspection. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the grounds that the record "does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door." *Van Gorder v. Grand Trunk W. Ry.*, No. 06-2451 U.S. Dist. LEXIS 28555 at *14 (6th Cir. 2007). Petitioner filed a Petition for Rehearing en banc of the Sixth Circuit's Decision on December 22, 2007. The Sixth Circuit subsequently denied the Petition for Rehearing on February 20, 2008.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's Decision ("Decision") affirming the order of summary judgment in favor of Respondent Grand Trunk Western Railroad ("Grand Trunk") is in conflict with other decisions of the United States Court of Appeals for the Sixth Circuit and opinions of the Supreme Court. The issue at hand is a question of great importance and consideration by the Supreme Court is necessary to secure and maintain uniformity of decisions of the Circuit Courts. The Decision is in conflict with *Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803 (6th Cir. 1996) where the Decision analyzes the quantum of evidence in the record as needed to survive summary judgment under the Federal Employer's Liability Act. Great deference is given to the jury in cases under Federal Employer's Liability Act. The Decision is in direct

conflict with *Aparicio* and other Circuit cases finding that a Federal Employers' Liability Act Petitioner shall withstand a motion for judgment as a matter of law by presenting more than a scintilla of evidence.

The lower court correctly determined that it "must decide only whether Grand Trunk conducted a reasonable inspection and exercised ordinary care". The court erred in finding that the Petitioner did not "present[ ] evidence and the record does not contain evidence sufficient to permit a reasonable jury to find that Grand Trunk's failure to require closing the door as part of the pre-trip inspection of the care made that inspection unreasonable." The Decision fully ignores the Petitioner's own sworn testimony in his capacity as an experienced carman with regard to reasonable inspections by the railroad consisting of both opening and closing the door of the car. This testimony raises a question of fact. Moreover, the affidavit of the Petitioner's expert witness, Michael Micek, raises a question of fact as to whether the Defendant's inspections of the railcar were reasonable. These factual questions should be decided by a jury at trial, not the court, as such is the standard for Federal Employers' Liability Act actions in the Sixth Circuit.

ARGUMENT

The Petitioner Presented Sufficient Evidence To Establish A Question Of Fact For The Jury To Resolve Regarding Whether Defendant Conducted A Reasonable Inspection And Exercised Ordinary Care.

In affirming the District Court's order granting summary judgment in favor of the Grand Trunk, the lower court's opinion is in conflict with its decision in *Aparicio v. Norfolk & W. Ry.*, Sixth Circuit decisions, and other circuit decisions regarding whether a railroad acted as a reasonably prudent employer pursuant to the FELA.

Congress intended that cases predicated upon the FELA be resolved by the jury, not the court, as greater deference is given to the jury's interpretation of the facts in FELA cases than ordinary negligence actions. *Basinger v. CSX Transp.*, No. 94-3908 U.S. App. LEXIS 19139 at *13 (6th Cir. 1996); *Richards v. CONRAIL*, 330 F.3d 428, 434 (6th Cir. 2003) (citing *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir. 1976)). The Supreme Court has noted that the right to a determination by jury is a basic, fundamental right guaranteed by the federal system of jurisprudence and thus, is "part and parcel of the remedy afforded railroad workers under the [Federal] Employers Liability Act." *Bailey v. Central Vt. Ry.* 319 U.S. 350, 354 (1943).

> Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury

> determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases — whether employer fault played any part in the employee's mishap.

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 508-509 (1957).

> It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35 (1943).

The Sixth Circuit noted that,

> Courts have struggled with the question of whether a Federal Employers' Liability Act Petitioner need present only slight evidence or a scintilla of evidence as to each element of his or her claim in order to withstand a motion for

> judgment as a matter of law, or whether a Petitioner must present something more than that.

Aparicio v. Norfolk & W. Ry., 84 F.3d 803, 808 (6th Cir. 1990).

The court concluded that, even in light of the conflicting Circuit Courts' opinions, a Petitioner must present more than a *scintilla* of evidence to prove that a railroad breached by failing to provide a safe working environment if it knew or should have known that it was not acting adequately to protect the Petitioner-employee. *See Aparicio*, 84 F.3d at 810-812; *see also Urie v. Thompson*, 337 U.S. 163, 178 (1949). In *Aparicio*, the Petitioner, who suffered from carpal tunnel syndrome as a result of a number of years of employment with the railroad, filed suit under the FELA. The District Court granted the defendant railroad's motions for summary judgment and judgment as a matter of law.

The Defendant railroad argued that it did not breach its duty to the Petitioner, as there were no specific standards regarding ergonomics set forth by the FRA. The lower court reversed the decision of the district court and held that the Petitioner had provided a bit more than a scintilla of evidence that his injuries were due to his employment with the railroad. Moreover, the lower court found that,

> The fact that a regulatory body has not issued any applicable ergonomic standards does not relieve Norfolk & Western of its duty to provide a workplace safe from foreseeable conditions, which might pose a danger to its workers.

Id. at 811.

Similarly, in this case, there is no specific industry standard for inspection of the door mechanisms of the railcar involved. Rather, as the lower court outlined in *Aparicio*, the standard is whether Defendant acted as a reasonably prudent employer. Specifically, Defendant knew or should have known about the defective door of the railcar if the two prior inspections were reasonable. Thus, there is question of fact for a jury as to whether these were proper and reasonable inspections of the railcar. To rule otherwise puts this decision in conflict with *Aparicio* and other Sixth Circuit cases. *See also Wilhelm v. CSX Transp., Inc.*, 65 Fed. Appx. 973 (6th Cir. 2003); *Bowe v. CONRAIL*, No. 99-4091 U.S. App. LEXIS 24866 (6th Cir. 2000); *Frazier v. CSX Transp., Inc.*, No. 97-3028 U.S. App. LEXIS 17117 (6th Cir. 1998); *Miller v Cincinnati, N.O. & T. P. R. Co.*, 203 F. Supp. 107 (E.D. Tenn. 1962). Upon the proof of the existence of defective equipment in the custody and control of the defendant at the time of the Petitioner's injury, it is a matter for the jury to say whether the defendant should have known of this condition by reasonable inspections or otherwise. *Miller*, 203 F. Supp. at 113.

The lower court agreed that Grand Trunk had "a duty to exercise reasonable care to protect Van Gorder, an employee". *Van Gorder v. Grand Trunk W. Ry.*, No. 06-2451 U.S. Dist. LEXIS 28555, *10 (6th Cir. 2007). However, the Decision goes on to state that Van Gorder cannot show that Grand Trunk breached that duty, failing to consider the all evidence presented in the record. Specifically, the Decision claims, "Van Gorder relies almost exclusively on the sworn affidavit of his purported expert, Michael Micek" *Id.* Not only did the Court choose to overlook the additional evidence

presented and contained in the record, but the lower court mistakenly ignored the Petitioner's own sworn testimony, which raises a question of fact. The lower court failed to consider the Petitioner's submitted evidence supporting his claim that that Defendant's alleged inspections were insufficient and unreasonable. In his sworn testimony, the Petitioner properly established, through his own prior experience of railcar inspection, that the opening and closing of the clamshell doors was customary in inspecting railcars. *See generally*, *Bowe v. CONRAIL*, No. 99-4091 U.S. App. LEXIS 24866 (6th Cir. 2000) (In a chemical exposure case, the court found that even where the Petitioner's expert witness testimony on causation was excluded, the "slim" evidence consisting of the Petitioner's own testimony and his medical report was sufficient to permit the case to survive summary judgment). Van Gorder's testimony raises a question of fact regarding whether the alleged prior inspections were reasonable. Inexplicably, his testimony was not mentioned in the lower court's Decision, which is now in conflict with *Aparicio*.

The Credibility Of Petitioner's Expert Witness Michael Micek And The Evidence Presented Through His Expert Testimony Should Be Weighed By The Jury, Not The Lower Court.

In *Aparicio*, the testimony of Dr. Robert Andres, the Petitioner's ergonomics expert, showed the ergonomic risk factors and remedial measures accepted in the scientific community. The court found that

> A jury could accept Dr. Andres' testimony and find that a reasonably prudent employer

> would have known about the risk factors and taken steps to ameliorate them.

Aparicio, 84 F.3d at 811.

Likewise, in the present case, the credibility and testimony of expert witness, Michael Micek should be weighed by the jury. The Court referred to Petitioner's expert witness Michael Micek, as a "purported expert", without due consideration of Mr. Micek's vast experience and qualifications as an inspector and equipment supervisor for the Federal Railroad Administration. Mr. Micek has twenty-three years of experience as a motive power and equipment inspector, motive power and equipment supervisory specialist and motive power and equipment supervisor for the United States Government as an employee of the Federal Railroad Administration. Mr. Micek has fourteen years of railroad experience as a carman and motive power and equipment supervisor whose duties included repair and inspection. Mr. Micek received numerous awards bestowed upon him by the Federal Railroad Administration, which include, but are not limited to, several Administrators Superior Achievement, Performance, and Team awards.

Mr. Micek's credentials were not challenged by the Defendant. Any apparent difficulties with his opinions are subject to cross-examination at trial. Mr. Micek was qualified to provide the expert opinion that the Defendant knew or should have known of the defect of the subject railcar prior to the injury of Petitioner. Mr. Micek opined that through his vast experience in the railroad industry, including twenty-three years with the FRA, a proper and reasonable inspection should have revealed a defect such as this.

In his expert affidavit before the District Court, Mr. Micek indicated that the use of a manlift was not the only method of inspecting for the worn canopy bolt as claimed by Defendant. Notably, this estimation is confirmed by Robert Miller and John Jaques and thus, the Petitioner is not relying on the expert affidavit solely. It is for the jury to determine whether the manlift was reasonable inspection by which the Defendant should have been aware of the defect. *Miller*, 203 F. Supp. at 113.

Mr. Micek also stated that, alternatively, the Defendant could have utilized the side ladders located on the railcar to inspect the top of railcar. Although the Decision states that the defective bolt was not visible from any angle, Mr. Jaques confirmed Mr. Micek's assessment in his testimony that if the car inspectors had gone on top of the roof, they would have also noticed this defective bolt. The Court found that climbing to an "upper most height" would be dangerous without the proper safety equipment. Climbing to an upper most height with proper safety equipment to observe hazardous conditions that might be otherwise undetectable may be reasonable to provide a safe workplace for railroad employees. It is a question for the jury whether a climbing inspection is reasonable. It is also questionable as to why, if a climbing inspection is reasonable, would the Defendant not provide proper safety equipment.

In addition to this alternative measure, it has been previously established that Defendant could have simply closed the door to complete the inspection. It was for the jury to determine whether utilizing the ladder the side ladders to inspect the top of the railcar or closing the doors are reasonable in this context. *Miller*, 203 F. Supp. at 113.

Mr. Micek's affidavit, Mr. Jaques's testimony, and the Petitioner's testimony create questions of fact regarding the means and methods of the prior inspections. The lower court's opinion states that Mr. Micek was unable to explain what would have constituted a proper inspection. The aforementioned evidence does not support this conclusion. The lower court goes on further stating that, "to observe the defect, Grand Trunk had to take the door apart". *Van Gorder*, at *11. The evidence presented by the Petitioner supports the conclusion that the Defendant could have observed the defect simply by closing the door. In fact, during the hearing regarding Defendant's Motion for Summary Judgment, Judge Rosen noted that Mr. Jaques had admitted in his deposition testimony that the act of closing the door would have revealed the defect and inquired as to why the reasonable inspection did not involve closing the door. It is reasonable to consider that the mere task of closing the door once it has been opened is an appropriate method of inspection. On this issue, the Petitioner has presented more than a scintilla of evidence through not only the expert opinion of Mr. Micek but additional evidence presented through the testimony of the Petitioner himself, Robert Miller and the affidavit of John Jaques. Again, the Petitioner has raised a question of fact to be resolved by the jury, not the Court, as greater deference is given to the jury's interpretation of the facts in FELA cases than ordinary negligence actions.

Finally, the Defendant has not presented any admissible evidence regarding its two previous alleged inspections. The only evidence that these inspections took place is through testimony of supervisors and not the alleged inspectors themselves. The credibility of these alleged inspections as well as of Mr. Van Gorder and Mr. Micek are issues to be weighed by a jury. *See Aparicio*, 84 F.3d at 812. Judge Rosen also restates the complexities of railcar inspection and the unclear nature of the procedures utilized by Grand Trunk by stating, "[i]nspection of the cars is a multi-step process that is inconsistent in its execution and is not entirely clear from the testimony of record." Therefore, a question of fact exists as to whether these inspections even took place and whether they were reasonable and proper. This clearly presents a question of fact as to whether these inspections were thorough and reasonable to satisfy Defendant's duty to provide Petitioner with a safe place to work as outlined in *Aparicio*, 84 F.3d 803.

The lower court's Decision conflicts with *Aparicio* and establishes a new non-jury standard under the FELA for determining whether the Defendant knew or should have known about a defective condition through reasonable inspections or otherwise, and if the inspection was, in fact, reasonable. It also establishes a new interpretation of the employers' duty under the FELA to adequately protect their employees. This court has ruled on questions of fact for the jury. Consideration by the Supreme Court is necessary to maintain uniformity among the circuit courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted it is necessary to maintain the uniformity of circuit court decisions pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED DECEMBER 11, 2007

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-2451

ELMER VAN GORDER,

Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD, INC., a division of Canadian National,

Defendant-Appellee.

Argued: September 17, 2007
Decided and Filed: December 11, 2007

Before: BATCHELDER and GILMAN, *Circuit Judges*; VARLAN, *District Judge*.*

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* The Honorable Thomas A. Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Appendix A

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Elmer Van Gorder ("Van Gorder") appeals the district court's order granting summary judgment in favor of Defendant-Appellee Grand Trunk Western Railroad ("Grand Trunk") in this negligence action filed pursuant to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* Van Gorder claims that the district court erred in finding that there were no genuine issues of material fact regarding the reasonableness of Grand Trunk's railcar inspections and that he had not established a prima facie negligence case. Finding no merit in Van Gorder's contentions, we **AFFIRM**.

I. BACKGROUND

Van Gorder began working at Grand Trunk on July 22, 1970, more than 33 years prior to the incident in question, which occurred on October 17, 2003. Grand Trunk initially hired Van Gorder as a T-carman. From 1981 until the time of the incident, Van Gorder served as a carman at the General Motors loading dock on David Road, at Grand Trunk's Flint Yard in Flint, Michigan.

Van Gorder's main task on the day of the incident was to remove bridge plates between the loaded bi-level railroad cars and close the doors of the cars to prepare them for transport. Prior to this preparation and consistent with the railroad's usual practice, other

Appendix A

Grand Trunk employees conducted two inspections of the railcars on which Van Gorder worked. Those "pre-trip" inspections are intended to discover defects in the cars and entail, among other things, looking at the doors to see visible problems, and opening, but not closing the doors.

In the course of his duties, Van Gorder attempted to close the "clamshell door" on one of the railcars. The door closed about halfway, or two to three feet, and then abruptly stopped, causing Van Gorder to stumble and his hands to slip off the door handle, resulting in an injury to his shoulder. Van Gorder is currently receiving approximately $2,600 per month in Railroad Retirement Disability because of his shoulder injury, for which he had replacement surgery on August 17, 2004.

Following the incident, Van Gorder immediately reported his injury to his superiors, then went to the hospital for examination. Robert F. Miller, Car Foreman, John P. Jacques ("Jacques"), Mechanical Department Supervisor and Technical Officer — Pool Operations, Ron Lord, Flint Assistant Superintendent, Hunt Carey, Flint Superintendent, and David Cromie, Risk Mitigation Officer, all inspected the railcar after Van Gorder returned from the hospital. Van Gorder was present for at least some of the inspection.

During the inspection, the Grand Trunk employees determined — through the process of elimination —

that the canopy bolt on top of the AR door, which at least partially controlled the door's movement, was worn. Although the door opened properly, because of the condition of the bolt, the door would "hang up" and become stuck while it was being closed.

The defective bolt — or, at least, the defective condition of the bolt — was not visible from the ground. After the incident, Jacques got into a man-lift machine and viewed the door and bolt from above. The wear on the bolt was not visible from this vantage point either, because it was in an area "sandwiched between the roof and the canopy." That is, the defect would only manifest itself when someone attempted to close the door, and was only visible when the top portion of the door was taken apart. An inspection from above, either in a man-lift machine or from the ladders on the sides of the railcar, would not reveal the defect. Moreover, Grand Trunk does not allow its employees to climb up the ladders to the roof of the railcar without the proper safety equipment.

Van Gorder filed this negligence action against Grand Trunk on February 2, 2005, pursuant to FELA, 45 U.S.C. § 51, *et seq.* On September 27, 2006, the district court issued its opinion and order granting summary judgment in favor of Grand Trunk, concluding that no genuine issue of material fact remained for trial and that Van Gorder had failed to produce evidence from which a jury could find that Grand Trunk was negligent. Van Gorder timely filed this appeal.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In order to defeat a summary judgment motion, the nonmoving party must "show sufficient evidence to create a genuine issue of material fact." *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002) (citing *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990)). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 252 (1986). That is, the nonmoving party must present sufficient evidence to permit a reasonable jury to find in that party's favor. *Id.* Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *See also Hartsel v. Keys*, 87 F.3d

795, 799 (6th Cir.1996). The party bearing the burden of proof must present a jury question as to each element of its case. *Hartsel*, 87 F.3d at 799 (citing *Celotex*, 477 U.S. at 322).

III. ANALYSIS

Van Gorder sued Grand Trunk under FELA, specifically alleging that Grand Trunk conducted an unreasonable and negligent inspection of a railcar that directly resulted in his injury. FELA provides in pertinent part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51. The statute contains a negligence standard. Consequently, to survive Grand Trunk's motion for summary judgment, Van Gorder needed to present evidence sufficient to raise a genuine issue of material fact as to every element of his negligence claim. *Celotex*, 477 U.S. at 322.

Appendix A

In order to present a prima facie case under FELA, Van Gorder must prove that: (1) he was injured within the scope of his employment; (2) his employment was in furtherance of Grand Trunk's interstate transportation business; (3) that Grand Trunk was negligent; and (4) that Grand Trunk's negligence played some part in causing the injury for which he seeks compensation under FELA. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 808 (6th Cir. 1985) (internal citations omitted); *see also Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 330 (1958).

We will view the evidence in the light most favorable to Van Gorder, the nonmoving party. It is undisputed that Van Gorder injured his shoulder during the course of his employment, and he was furthering Grand Trunk's interstate transportation business in preparing the railcars for loading and transport. Therefore, Van Gorder has satisfied the first two of the required FELA elements. The fatal flaw in Van Gorder's complaint, however, is that he cannot show that Grand Trunk was negligent.

To succeed on his FELA claim, Van Gorder must "prove the traditional common law elements of negligence; duty, breach, foreseeability, and causation." *Adams v. CSX Transportation Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)); *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001). Van Gorder correctly contends that FELA relaxes a plaintiff's standard of proof regarding causation. *Rogers v.*

Missouri Pacific RR. Co., 352 U.S. 500, 506 (1957) (ruling for the plaintiff-employee and stating that, under FELA, the "test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even in the slightest, in producing the injury."). Therefore, *if* Grand Trunk were negligent, Van Gorder need only show that its negligence contributed even slightly to his injury. But, contrary to Van Gorder's assertion, the relaxed causation standard under FELA does not affect his obligation to prove that Grand Trunk was in fact negligent. *Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598-99 (6th Cir. 2001).[1] FELA does not lessen a plaintiff's burden to prove the elements of negligence.

Under FELA, a railroad has a duty to provide its employees with a reasonably safe workplace; this does not mean that a railroad has the duty to eliminate all workplace dangers, but only the "duty of exercising reasonable care to that end." *Baltimore & Ohio S. W. R. Co. v. Carroll*, 280 U.S. 491, 496 (1930). Grand Trunk does not dispute that it had a duty to exercise reasonable care to protect Van Gorder, an employee. Thus, Van Gorder established the duty component of the negligence standard. Van Gorder cannot, however, show that Grand Trunk breached that duty.

---

1. *Perkins* was decided under the Jones Act, 46 U.S.C. § 688. The court, however, stated that the Jones Act simply provides for seamen parallel rights that FELA provides railroad employees. *Perkins*, 246 F.3d at 598.

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A railroad breaches its duty to its employees when it fails to use ordinary care under the circumstances or fails to do what a reasonably prudent person would have done under the circumstances to make the working environment safe. *Tiller v. Atlantic C. L. R. Co.*, 318 U.S. 54, 67 (1943); *Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803, 811 (6th Cir. 1990). That is, a railroad breaches its duty when it "'knew, or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect [the plaintiff] and similarly situated employees." *Aparicio*, 84 F.3d at 811 (quoting *Urie v. Thompson*, 337 U.S. 163, 178 (1949)). A railroad must act reasonably and use ordinary care to protect its employees.

Van Gorder specifically alleges that Grand Trunk's pre-trip inspections were not reasonable and that by performing only those inspections, Grand Trunk breached its duty of care. Van Gorder contends that the manner in which the visual inspections were performed was not thorough enough to reveal the defective bolt, and that the pre-trip inspection was not undertaken with ordinary care because it did not include closing the clamshell doors, which would have exposed the defect. In attempting to prove that Grand Trunk's pre-trip inspections were unreasonable, Van Gorder relies almost exclusively on the sworn affidavit of his purported expert, Michael Micek ("Micek"). But Micek did not inspect the door of the railroad car at issue, nor does he state in his affidavit that he has any particular familiarity with either the type of car or the type of door at issue. He fails to point to any standard of care to which Grand

Trunk failed to conform and he does not explain what kind of inspection would have been reasonable. Micek's affidavit simply makes the conclusory statement that Grand Trunk did not act reasonably because in its pre-trip inspections, it did not discover the defective bolt.

Van Gorder first claims that Grand Trunk would have discovered the defect if it had viewed the door from the roof of the railcar. In his affidavit, Micek claims that Grand Trunk employees could have climbed the ladder on the side of the rail car to its "upper most height" and seen the defect in the bolt. But Micek did not actually see the car, or climb the ladder. Jacques — who personally inspected the car — testified at his deposition that he could not see the defect in the bolt either from above the car or from the ground below. Furthermore, Jacques stated that it would be dangerous for an employee to climb the ladder to its upper-most heights without the proper safety equipment. There is no question that Jacques has substantial experience in dealing with the bi-level auto carrier railcars with clamshell doors, like the one in question. Nothing in the record establishes that Micek has any such experience.

Most significant here, however, was Micek's inability to explain what would have constituted a proper inspection. Micek provided no specific information to explain why Grand Trunk's inspection was not reasonable. He provided no evidence to dispute Grand Trunk's specific, first-hand testimony that the defective bolt was not visible from any angle, and that to observe the defect, Grand Trunk had to take the door apart.

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Van Gorder cannot raise a genuine issue of fact regarding the reasonableness of Grand Trunk's inspection by suggesting that it should have used a different method to perform the inspection, when the method he advocates would not have revealed the defect that led to his injury.

Van Gorder next claims that Grand Trunk merely had to close the door to discover the defect; that closing the doors during the pre-trip inspection would be very easy for Grand Trunk; and that failure to do so made the pre-trip inspection unreasonable. We need not decide what might be easy for the railroad, nor need we indulge Grand Trunk's hypothetical assertions that, in this case, closing the door during the pre-trip inspection might simply "have provided us with a different plaintiff." We must decide only whether Grand Trunk conducted a reasonable inspection and exercised ordinary care. Van Gorder has not presented evidence and the record does not contain evidence sufficient to permit a reasonable jury to find that Grand Trunk's failure to require closing the door as part of the pre-trip inspection of the car made that inspection unreasonable.

Jacques testified that the pre-trip inspectors would ordinarily recognize a problem with the door upon opening it. Van Gorder himself testified that he had never encountered a door with a defect like the one in question, and that if a door were going to be defective, he "would usually know in the first few inches" of closing it. Van Gorder agreed that the door in question was

unusual, and he presented no evidence that Grand Trunk knew or had reason to know of the particular defect in the door or that such a defect would cause the injury Van Gorder sustained. In short, Van Gorder presented no evidence from which a jury could find that Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railroad cars, or that its method of pre-trip inspection of the cars was unreasonable.

Under FELA, the "test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part . . . in producing the injury." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116 (1963); *Rogers*, 352 U.S. at 506. If the record contains evidence from which the court could draw the conclusion that the employer's negligence played any part in the plaintiff's injury then it must send the case to the jury, even if the evidence would also allow the jury to find for the employer. *Id.* at 116-17. But a plaintiff cannot benefit from FELA's relaxed causation standard unless he can prove that the employer was negligent in the first place, and this Van Gorder has wholly failed to do.

The record in this case does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door. In the absence of that evidence, summary judgment for Grand Trunk was appropriate. *Celotex*, 477 U.S. at 322; *see also Hartsel*, 87 F.3d at 799.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DECIDED AND FILED SEPTEMBER 27, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 05-CV-70380-DT

ELMER VAN GORDER,

Plaintiff,

vs.

GRAND TRUNK WESTERN RAILROAD, INC.,
a division of Canadian National,

Defendant.

September 27, 2006, Argued
September 27, 2006, Decided
September 27, 2006, Filed

OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on September 29, 2006

PRESENT: Honorable Gerald E. Rosen

United States District Judge

Appendix B

I. INTRODUCTION

This action arises out of an incident which occurred on October 17, 2003, when Plaintiff Elmer Van Gorder, while employed as a carman by Defendant, Grand Trunk Western Railroad, Inc., ("Grand Trunk"), injured his right shoulder when he attempted to close the left clamshell door of a bi-level auto carrier railcar. On February 2, 2005, Mr. Van Gorder filed the instant negligence lawsuit against Grand Trunk pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.* Discovery has closed and Defendant has moved for entry of summary judgment in its favor. Plaintiff has responded to Defendant's Motion and Defendant has replied.

The Court heard oral argument on this matter on July 20, 2006. At the conclusion of this hearing, the Court took the matter under advisement.

Meanwhile, counsel for the parties advised the Court that the parties were pursuing extra-judicial facilitation in an attempt to resolve this matter and, accordingly, requested that the Court withhold deciding the summary judgment motion. On September 5, 2006, however, the parties informed the Court that they failed to reach a resolution through facilitation and therefore, requested that the Court issue its decision. Accordingly, the Court now issues this Opinion and Order setting forth its ruling on the matter.

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II. PERTINENT FACTS

Plaintiff Elmer Van Gorder, born July 4, 1952, is a life-long resident of Durand, Michigan. At the time of the accident giving rise to this action, Van Gorder had worked for the Defendant railroad for approximately 33 years, since July 22, 1970.

Van Gorder was hired by the Defendant as a T-carman and has continued to work as a carman out of the Defendant's Flint Yard until the time of the subject October 17, 2003 incident. Plaintiff's primary job since 1981, was working at the GM loading dock at David Road, where the accident occurred. He worked the day shift, 7:00 a.m. to 3:00 p.m., Monday through Friday.

On October 17, 2003, Plaintiff was placing bridge plates between bi-level cars that had been delivered to the David Road loading dock. Bi-level railcars were delivered to the dock previously prepped and inspected by the Grand Trunk. On the day of the accident, the railcars had been pre-inspected by the Grand Trunk and consequently, the railcar doors were open. Van Gorder was working with another crew member, Doug Haskins, removing bridge plates from the railcars. During the course of his normal duties, Van Gorder attempted to close the clamshell door of the Grand Trunk bi-level car. In the course of this process, the door suddenly jammed and stopped, causing Plaintiffs hands to slip off the end of the door and he fell, injuring his right shoulder. John P. Jaques, Mechanical Department Supervisor and Technical Officer – Pool Operations, also verified that

during the inspection of the door following Plaintiffs injury, he was only able to close the door partway.

Following Plaintiff's accident, Robert F. Miller, Car Foreman, along with Jaques, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey, and Risk Mitigation Officer David Cromie performed a mechanical inspection of railcar TTGX9985596. During this post-accident inspection, it was determined that the canopy bolt on the top of the cars AR door was defective and worn. This defective bolt caused the door to become stuck during closing. At issue in this case is whether this defect should have been discovered by Grand Trunk during its pre-delivery inspection of the railcar, ergo providing safe working conditions for Plaintiff. The car was allegedly inspected twice by Grand Trunk prior to Van Gorder's accident: once upon arrival at the Grand Trunk David Road Yard and once when the door was inspected solely by opening, but not closing the door.

A. Car Inspection Procedures at David Road

The GM plant at David Road in Flint, Michigan produces only trucks and SUVs. Therefore, all auto carriers delivered at David Road for loading are bi-level railcars. Bilevel auto railcars are delivered on the midnight shift or early in the day shift at David Road and spotted along the loading docks. The David Road loading docks have six tracks, each with the capacity of five bi-level cars.

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Auto carrier bi-level railcars delivered to the David Road GM facility are generally pre-inspected at Bristol Yard in Flint, prior to their delivery to the David Road loading docks in Flint. Inspection of the cars is a multi-step process that is inconsistent in its execution and is not entirely clear from the testimony of record. Apparently, the pre-inspection includes opening the doors of the railcar to determine whether any lubrication, cleaning or any repair is needed prior to being delivered to the David Road loading dock. If, during the pre-inspection, an exception is taken to the condition of the railcar and/or door of the railcar, it will be repaired on site, if possible or "bad-ordered" and moved to a repair facility, if it cannot be repaired on site.

There were times when the bi-level railcars would arrive at the David Road loading dock without having been previously prepped and inspected. This lack of a pre-inspection was indicated by closed doors on the railcars. If the railcars had not been inspected and prepped, it would then be the job of Van Gorder and Haskins' to open the doors on the cars and inspect the A and B deck for safety appliances, chocks, broken straps, etc., prior to placing in the bridge plates for loading. Regardless of this inspection status of the cars, it was the job of Van Gorder and his crew member, Doug Haskins, to put in bridge plates between the bi-level cars on the A and B decks of the railcars to enable the loading of all five railcars on the six tracks at the dock. The actual loading of the cars would be performed by

GM and/or its contractor. Once the railcars are loaded by GM and/or its contractor, the next step was for Van Gorder and Haskins to inspect the cars to insure they were properly chocked and strapped down. They would remove the bridge plates and close the railcar doors. Van Gorder testified that the procedure at the time of the accident was for his partner to walk ahead of him on the bottom deck and take down the top bridge plates. His partner would step on the release lever and open the door six to eight inches and Van Gorder would then shut the doors.

B. Incident of October 17, 2003

Van Gorder reported for work at the David Road yard shortly before the start of the shift at 7:00 a.m. on October 17, 2003, and the accident occurred at approximately 12:15 p.m. The docks were loaded with railcars and some of the railcars had already been loaded with GM trucks and SUVs, with the doors closed. Most of the railcars had been pre-inspected at the prep track at the Bristol Road yard, as the doors of the railcars were locked open.

Van Gorder and Haskins, worked in their normal manner, as described above removing bridge plates from the railcars. Haskins was working approximately two cars ahead of Van Gorder releasing the pins for the doors. The doors on the railcar at issue here, car number TTGX985596, were locked open, indicating that it had been pre-inspected in Bristol. Van Gorder, therefore, did not inspect the doors.

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Van Gorder had just completed inspecting the A-deck (bottom deck) of TTGX985596 when he got down to close the doors. Van Gorder was standing on the ground facing the left clamshell door as he attempted to close the door, pulling from left to right using both hands, with his right hand doing most of the pulling. The door initially moved freely and with no resistance. After moving the door approximately half way closed, the door, without warning, completely stopped causing both of his hands to slip off the end of the door and he nearly fell down. Van Gorder then felt a sharp pain in his right shoulder as well as in his fingers. Van Gorder had experienced problems with doors "hanging up" in the past, but not to the extent of the incident that caused his injury. Immediately after the incident, Van Gorder informed Haskins that he had injured his shoulder and hands as a result of attempting to close the door. He was taken to McLaren Medical Center for treatment.

C. Investigation of the Incident

Mr. Miller, Van Gorder's supervisor and Car Foreman, was advised by telephone of the alleged injury incident. On the day of the incident, Miller spoke with Plaintiff at the doctor's office where Van Gorder was being treated, and was present when Plaintiff was interviewed concerning the accident by Defendant's Risk Mitigation Officer, Dave Cromie. Also present during Van Gorder's recorded interview was John Jaques, Mechanical Supervisor and Technical Officer. Following the interview with Van Gorder, a mechanical inspection of railcar TTGX9985596 was undertaken.

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D. Mechanical Inspection of Railcar TTGX9985596

Railcar TTGX9985596 was taken by the switch crew to the RIP (repair-in-progress) track in Flint, for mechanical inspection. At 3:30 p.m., on October 17, 2003, Mr. Miller, Car Foreman at Flint RIP track, performed an inspection of the railcar along with John P. Jaques, Mechanical Department supervisor and Technical Officer – Pool Operations, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey, and Risk Mitigation Officer David Cromie. Initially, Miller and Jaques were unable to visually determine any problem with the railcar door. However, after being elevated over the top of the roof of the railcar in a man lift bucket inside the repair facility, they were able to determine that the canopy bolt on the rooftop of the AR door was worn. Miller explained that on the roof of the car, where the door hooks into the top of the car, there is a pivot arm or bolt upon which the door swings or rotates as the door opens and closes. The mechanical inspection revealed that the AR door on the railcar was able to be opened without problems. The defect in the door manifested itself in closing the door, by stopping, before it was able to be fully closed. According to the unsworn affidavit of Mr. Jacques, the Bi-level auto carrier TTGX9985596 was not owned by the Defendant railroad, but was owned by the Union Pacific Railroad and interchanged with the Defendant railroad for delivery at the GM plant serviced by the David Road loading facility.

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D. Plaintiff's Complaint in this Action

Van Gorder initiated this action in this Court on February 2, 2005. In his Complaint, Plaintiff alleged that Defendant Grand Trunk was negligent in failing to provide the Plaintiff with a safe place to work; failing to properly warn the Plaintiff of possible hazards to his health; failing to keep its equipment and property in a proper and safe manner properly inspect, repair, and maintain its equipment and property; failing to comply with State and Federal Statutes including, but not limited to 45 U.S.C. § 51 et seq. and related Federal and State Rules ad Regulations promulgated thereunder, including, but not limited to 49 C.F.R § 215; failure of the Defendant to properly operate the job, together with other negligent acts or omissions; and in the general reckless, careless and negligent manner in which the defendant, its agent, servants and employees conducted its business.

Van Gorder alleged these acts caused him to suffer physical and emotional injuries, metal anguish, embarrassment, humiliation, disability, lost wages, denial of social pleasure and enjoyments, change of lifestyle, and future damages.

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III. DISCUSSION

A. STANDARDS APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is proper "'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c).

Three 1986 Supreme Court cases — *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); — ushered in a "new era" in the standards of review for a summary judgment motion. These cases, in the aggregate, lowered the movant's burden on a summary judgment motion.[1] According to the *Celotex* Court,

> In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. *Celotex*, 477 U.S. at 322.

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1. "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A C. Wright, A. Miller, M. Kane, *Federal Practice & Procedure*, § 2727, at 35 (1996 Supp.)

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After reviewing the above trilogy, the Sixth Circuit established a series of principles to be applied to motions for summary judgment. They are summarized as follows:

> * The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> * The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."
>
> * The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.
>
> * The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the

> respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Betkerur v. Aultman Hospital Association, 78 F.3d 1079, 1087 (6th Cir. 1996). *See also*, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). The Court will apply the foregoing standards in deciding Defendant's motion for summary judgment in this case.

B. PLAINTIFF HAS FAILED TO MAKE OUT A CLAIM OF NEGLIGENCE

The Federal Employers' Liability Act, ("FELA"), provides, in part,

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

45 U.S.C. § 51.

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To present a *prima facie* case under the FELA, a plaintiff must prove that: (1) the plaintiff was injured while in the scope of employment; (2) the plaintiff's employment is in furtherance of the railroad's interstate transportation business; (3) the employer was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the FELA. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 808 (6th Cir. 1985). Federal common law controls what constitutes negligence under the Federal Employers' Liability Act. *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027 (1949) (footnote omitted).

To prove that the employer was negligent, it is well-settled that the FELA plaintiff must "'prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.'" *Adams v. CSX Transportation, Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)); *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 258 (2001).[2] It is incumbent on the

2. Although Plaintiff is correct in that FELA has a relaxed standard of proof regarding *causation* ("Under this statute [FELA] the test of a jury case is simply is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury," *Rogers v. Missouri Pacific RR Co.*, 352 U.S. 500, 506 (1957)), it is only this one *prima facie* element of a negligence claim that is relaxed; it does not relieve Plaintiff of the burden of proving duty and breach of that duty. *See McKennon v. CSX Transportation, Inc.*, 897 F. Supp. 1024, 1026 n. 1 (M.D. Tenn. 1994), aff'd 56 F. 32 64 (6th Cir. 1995) *see also, Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 597-99 (6th Cir. 2001).

plaintiff to prove all of the elements of his claim, including duty and breach of duty. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803, 810 (6th Cir. 1996), *abrogated on other grounds, Reeves v. Sanderson Plumb. Prod., Inc.*, 530 U.S. 133 (2000); *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110, 1113 (5th Cir. 1985).

Railroads have a duty to furnish employees with a "reasonably safe place in which to work and such protection [against the hazard causing the injury] as would be expected of a person in the exercise of ordinary care under those circumstances." *Urie v. Thompson, supra*, 337 U.S. at 179 n. 16, 69 S.Ct. at 1029 n. 16, (citing *Sadowski v. Long Island R.R. Co.*, 292 N.Y. 448, 55 N.E.2d 497, 501 (1944)). Plaintiff's FELA claim in this case is predicated upon Grand Trunk's alleged negligent pre-inspection of the subject railcar. However, Plaintiff has failed to present evidence of the proper standard of care, i.e., "the ordinary care under the circumstances," by which such an inspection is to be measured.

Plaintiff purports to rely on the Affidavit of his expert witness, Michael Micek. Mr. Micek's affidavit, however, does not set forth any industry standard as to railcar inspection. Rather, he only conclusorily states that "[h]ad Grand Trunk Western Railroad, Incorporated conducted thorough and proper inspections of said car, it should have discovered that the AR door top canopy bolt. . . was defective as it was worn." Nowhere in Mr. Micek's affidavit does he say what the industry standard is.

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Plaintiff also relies upon 49 C.F.R. § 215.9(c) and argues that this regulation requires that rail cars be defect free upon arrival and departure and that the railroad cannot move a defective car except to move it to the repair lot. In this regard, he also points to paragraph 6 of the Micek Affidavit in which Mr. Micek states:

> The Federal Railroad Administration rules and regulations regarding inspection of equipment applies to bi-level auto carrier[s] including the rail car TTGX985596 in question. Those regulations require that a car cannot be put into service unless the care is 100% defect free.

The regulation relied upon by Plaintiff and his expert, 49 C.F.R. § 215.9, provides, in pertinent part, as follows:

> (a) A railroad freight car which has any component described as defective in this part may be moved to another location for repair only after the railroad has complied with the following:
>
> (1) A person designated under § 215.11 shall determine:
>
> (i) That it is safe to move the car; and

> (ii) The maximum speed and other restrictions necessary for safely conducting the movement; [and]
>
> * * *
>
> (3) A tag or card bearing the words "bad order" of "home shop for repairs" . . . shall be securely attached to each side of the car. . . .
>
> * * *
>
> (c) Movement of a freight car under paragraph (a) of this section may be made only for the purpose of effecting repairs. . . .

As the Court observed at the July 20, 2006 hearing, this regulation sets a strict liability standard. FELA, however, is a negligence statute. The Court notes that although the Second and Seventh Circuits have stated that the principle of "negligence *per se*" reaches injuries resulting from a FELA employer's regulatory violations, *see Morant v. Long Island Railroad*, 66 F.3d 518, 523 (2nd Cir. 1995); *Walden v. Illinois Central Gulf Railroad*, 975 F.2d 361, 364 (7th Cir. 1992), the Sixth Circuit has not so ruled.

In any event, even if our Circuit would hold that a regulatory violation establishes negligence *per se* for purposes of a FELA cause of action, the regulation relied upon by Plaintiff, 49 C.F.R. § 215.9, does not apply to

the alleged defective component at issue. This regulation only applies to freight cars having components "described as defective *in this part*," i.e., in Part 215 of Title 49. Parts 103 through 129 of Title 49, 49 C.F.R. §§ 103-129, describe the defective components to which § 215.9 applies. These include defective wheel flanges (§ 215.103); defective axles (§ 215.105); defective bearings (§ 215.107-119); defective frames or springs (§ 215.119); defective car center sills, plates or coupler carriers (§ 215.121); defective couplers (§ 215.123-125); defective draft gears (§ 215.127); and defective cushioning devices (§ 215.129). Clamshell doors, which is the component part alleged to be defective in this case, are *not* among the defective components to which § 215.9 applies.

Plaintiff has not pointed to any cases construing this regulation nor has the Court found any such cases. However, as the subparts enumerated above make clear, only parts which affect the *movement of the car itself*, appear to be subject to the prohibitions of 49 C.F.R. § 215.9. Freight car doors do not affect the movement of the car itself. Therefore, the Court finds Plaintiff's reliance on 49 C.F.R. § 215.9 misplaced. Nothing alleged to have occurred in this case constitutes a violation of § 215.9 and, accordingly, the principle of "negligence *per se*," even if it were recognized in this Circuit, is inapplicable.

In sum, Plaintiff Van Gorder's failure to meet his burden to establish all of the elements of claim of negligence entitles Defendant Grand Trunk to summary judgment on Plaintiff's FELA claim.

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CONCLUSION

For the reasons stated above in this Opinion and Order,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted and Plaintiff's Complaint is dismissed, in its entirety, with prejudice.[3] Let Judgment be entered accordingly.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: September 27, 2006

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3. Although Plaintiff attempted to argue at oral argument that, based upon the last paragraph of Mr. Micek's Affidavit, he can make out a strict liability claim under the Federal Safety Appliance Act ("FSAA"), contrary to Plaintiff's assertions, he did not allege a violation of the Safety Appliance Act in his Complaint; he alleged only claims of negligence under FELA.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 20, 2008

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-2451

ELMER VAN GORDER,

Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD, INC., A DIVISION OF CANADIAN NATIONAL,

Defendant-Appellee.

ORDER

BEFORE: BATCHELDER and GILMAN, Circuit Judges; and VARLAN,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en

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* Hon. Thomas A. Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR PANEL REHEARING FILED APRIL 11, 2008

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term 2007

01cv01595

No. 06-5294

Role Models America, Inc.,

Appellant

v.

Pete Geren, Secretary of the Army and
Margaret Spellings, Secretary of Education,

Appellees

BEFORE: Randolph, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on March 21, 2008, it is

ORDERED that that petition be denied.

Appendix D

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

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No. 08-101

Supreme Court, U.S.
FILED
SEP 24 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ELMER VAN GORDER,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's rigorous analysis of the evidence on record and Opinion affirming the District Court's grant of Summary Judgment to Respondent does not conflict with a decision of this Court or a Court of Appeals and where the Petition for a writ is merely an attempt to reargue factual findings made by the trial court and affirmed by the United States Court of Appeals for the Sixth Circuit?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Grand Trunk Western Railroad, Inc. is an indirect subsidiary of Canadian National.

Canadian National is the only publicly held company that owns 10% or more of Grand Trunk Western Railroad, Inc.'s stock.

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STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Elmer Van Gorder filed his Complaint in the U.S. District Court for the Eastern District of Michigan, seeking damages pursuant to the Federal Employers' Liability Act, (FELA) 45 U.S.C. §51 *et seq.* for injuries allegedly sustained on October 17, 2003 when Petitioner, while employed by the Respondent Grand Trunk Western Railroad, Inc. ("Grand Trunk") as a carman or car inspector at the David Road loading docks, in Flint, Michigan, attempted to close the left clamshell door of a bi-level auto carrier railcar, number TTGX985596, and allegedly injured his right shoulder. Petitioner's Complaint alleges that Respondent Grand Trunk was negligent in failing to properly provide Petitioner with a safe place to work, in allegedly failing to keep its equipment and property in a proper and safe manner, in the alleged failure to properly inspect, repair and maintain its equipment and property, and in the alleged failure of the Respondent to comply with applicable Federal and State regulations, including but not limited to 49 CFR §215. (R.1, Complaint, ¶9, pp. 2-3)

While Petitioner pled his claim in negligence, under the FELA, he presented his claim as one sounding in strict liability, arguing essentially that there was a defect in the door of the subject railcar and therefore the Respondent railroad is liable. Respondent filed its Motion for Summary Judgment of Petitioner's complaint in the U.S. District Court on

the basis that the Petitioner's Complaint should be dismissed because there is no evidence that the Respondent had either actual or constructive notice of the defective condition of the clamshell door of the subject railcar prior to the incident in question, which is a necessary element of the Petitioner's negligence claim. (R.11 Motion and Brief in Support of Motion for Summary Judgment and Exhibits A through G)

On September 27, 2006, the U.S. District Court entered its "Opinion and Order Regarding Defendant's Motion for Summary Judgment," granting Respondent's Motion and dismissing Petitioner's Complaint in its entirety, with prejudice. In its Opinion granting Summary Judgment to Respondent, the U.S. District Court held that the Petitioner had failed to make out a claim of negligence. (Petitioner App. B, 25a-27a, 30a)

In its Opinion, the U.S. District Court held that Petitioner's reliance upon 49 CFR §215.9(c) and its strict liability standard or *negligence per se standard* is misplaced and has no application to the facts of the instant case. (Petitioner App. B, 28a-30a) In its Opinion dismissing Petitioner's Complaint in its entirety, with prejudice, the U.S. District Court, in a footnote, noted that Petitioner had attempted to argue at oral argument, based upon the last paragraph of his expert, Mr. Micek's Affidavit, that he can make out a strict liability claim under the Federal Safety Appliance Act (FSAA). The U.S. District Court noted, however, that contrary to Petitioner's assertions, Petitioner had never alleged a violation of the

Safety Appliance Act in his Complaint, but only set forth claims alleging negligence under the FELA. (Petitioner App. B, 31a) Judgment was entered in favor of the Defendant Grand Trunk on September 27, 2006. (R.20, Judgment)

On Appeal of the U.S. District Court's Order, Petitioner made no argument of error in the U.S. District Court's ruling as to the regulations, 49 CFR §215.9(c), having no application to the facts of the case nor did Petitioner appeal the U.S. District Court's holding that the case was not a Safety Appliance Act case nor that Plaintiff had not pled a Safety Appliance Act case. On Appeal to the Sixth Circuit Court of Appeals, Petitioner argued, as he does in this Court, that the lower court erred in dismissing his Complaint arguing there are questions of fact relative to the Respondent's claim of negligence.

The Court of Appeals for the Sixth Circuit conducted a rigorous analysis of the evidence in the record, applying well-established legal standards pursuant to Fed. R. Civ. P. 56(c) and FELA and affirmed the Judgment of the District Court in its grant of Summary Judgment to the Respondent Grand Trunk. The Sixth Circuit Court of Appeals held that Petitioner Van Gorder needed to present evidence sufficient to raise a genuine issue of material fact as to every element of his negligence claim. The Court of Appeals for the Sixth Circuit found that "the fatal flaw in Van Gorder's complaint, . . . is that he cannot show that Grand Trunk was negligent." *Van Gorder v. Grand Trunk Western R.R. Inc.*, 509 F.3d 265 at 269

(6th Cir. 2007), (Petitioner App. A, 7a) The Sixth Circuit Court of Appeals in *Van Gorder* states at 271, (Petitioner App. A, 12a):

> Under FELA, the "test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part . . . in producing the injury." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); *Rogers*, 352 U.S. at 506, 77 S.Ct. 443. If the record contains evidence from which the court could draw the conclusion that the employer's negligence played any part in the plaintiff's injury then it must send the case to the jury, even if the evidence would also allow the jury to find for the employer. *Id.* at 116-17, 83 S.Ct. 659. But a plaintiff cannot benefit from FELA's relaxed causation standard unless he can prove that the employer was negligent in the first place, and this Van Gorder has wholly failed to do.
>
> The record in this case does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door. In the absence of that evidence, summary judgment for Grand Trunk was appropriate. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *see also Hartsel*, 87 F.3d at 799.

B. Statement of Facts

Before detailing the evidence in the record relevant to Petitioner's argument on his Petition for Writ, Respondent must point out that Petitioner's submitted Statement of the Case is inappropriately replete with factual arguments, misstatements and omissions as to the facts on record before the lower court.

Particularly glaring in view of Petitioner's arguments consisting of alleged erroneous factual findings by the lower court, is the omission of facts in the record relative to Grand Trunk's inspection procedures and standards, the post-accident mechanical inspection of the railcar in question and Petitioner's own testimony on these points, which are set forth in detail below. Not only does Petitioner omit relevant, material facts, but to the extent Petitioner states facts, for the most part the facts as stated by the Petitioner are grossly mischaracterized and inaccurate.

The evidence on record supports the lower court's Opinion affirming the grant of summary judgment to the Respondent. The un-rebutted evidence in the case is that there was a defect in the clamshell AR door canopy bolt which manifested itself upon the canopy bolt's failure at the time of the accident. Thus, the first notice to the Respondent of the defect in the railcar was upon the failure of the bolt, when Petitioner closed the door at the time of the incident. Petitioner did not produce any evidence to establish that a routine visual inspection of the door from the

ground or from the top of the roof of the railcar or from any vantage point would have revealed the defect in the AR door canopy bolt, nor was any evidence produced of any alternative allegedly proper method or procedure of inspection which would allegedly demonstrate that the Respondent could have discovered the defect in the railcar upon reasonable inspection, prior to the incident.

1. Railcar Inspection Standards.

The testimony of John P. Jaques, an employee of Grand Trunk for 36 years at the time of the accident in question and the Mechanical Department Supervisor and Technical Officer, Special Equipment, Pool Operations, was presented relative to inspection procedures and standards as well as his personal post-accident mechanical inspection and investigation of the railcar in question. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 4-10) In his position, as Mechanical Department Supervisor and Technical Officer, Special Equipment, Pool Operations, it was Mr. Jaques' responsibility, among other things, to ensure that auto carrier railcars, including bi-levels utilized by the auto industry are in proper and safe condition for use by the auto industry and while being transported by the Respondent railroad on its lines. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 6-8, 10) Mr. Jaques testified that the level of maintenance

and inspection conducted by the Respondent on multi-level auto carrier railcars such as the subject railcar is based upon the Association of American Railroads (AAR) Manual of Standard and Recommended Practices, Appendix B as well as Federal Railroad Administration (FRA) regulations. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7, 12-13, 17-18)

The concept of Pool Operations was explained by Mr. Jaques as a large group of multi-level auto carrier railcars in the industry, such as the one involved in this case. Such railcars are pooled and are distributed to different loading facilities throughout the country by TTX Reload, a trailer train company that operates and has control of the pool of railcars, the goal being to reduce the movement of these cars in the unloaded condition. Part of Mr. Jaques' job duties is to make sure that these railcars on Respondent's line have the maintenance and repairs necessary to keep the cars in proper and safe condition for loading and transit. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 10-14, 6-8)

2. Visual Inspection of Railcars For Patent Defects

Inspections of railcars take place on a continuous basis. There are pre-trip inspections, running gear inspections, inbound and outbound inspections. These

inspections take place in all kinds of weather, throughout the year on a continuous basis. These inspections are for the most part visual inspections. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7-8, 12-13, 17-18, 20, 23-27) On any of these inspections, if an exception is taken to the condition of the railcar the railcar will be repaired on site if possible or bad-ordered and moved to a repair facility, if it cannot be repaired on site. When a railcar is bad-ordered the car is tagged and sent to the repair track for repairs. Paperwork will be generated for the railcar as to any bad-order conditions. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 17, 28-29; R.11 Defendant's Motion for Summary Judgment, Exhibit C, Deposition Robert F. Miller, pp. 7-8)

On every trip, including pre-trip, whenever a train is made up, a basic running gear inspection would be performed. A running gear inspection would include a visual review or inspection, "for the most part . . . [of] everything below the first deck of the car; the coupler, the wheels and things of that nature." Whenever a train is made up, those components are reviewed to make sure that they are in federally mandated condition. Some inspection procedures, especially with running gear and anything federally regulated by the FRA are more stringent and defined. The running gear inspection is done either prior to or during the pre-trip inspection. (R.14 Defendant's

Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 12, 18, 24)

All railcars, including multi-levels, get inbound and outbound inspections. A pre-trip inspection can happen both before, during or after the inbound inspection. Mr. Jaques testified that in the Bristol Yard facility in Flint, Michigan, for the most part, the inbound inspection occurs at the same time as the pre-trip inspection. An inbound inspection would include, primarily, a review of the wheels, the rolling and running gear, the couplers and safety appliances to make sure that all railcars are in safe condition while being transported on Defendant's line. Mr. Jaques testified that a carman never has to get on top of the railcar to inspect a railcar during a pre-trip inspection, inbound or outbound inspection. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 23-25, 17, 25)

3. Pre-Trip Inspection Prior To Loading of Multi-Level Railcars.

Prior to loading of the multi-level railcars, a pre-trip or "prep repair and review" inspection takes place. This pre-trip inspection can take place prior to or at the actual loading dock. During a pre-trip inspection a visual inspection of the outside of the railcar will be made to determine whether there is any visible defect or exception to be made to the car.

(R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7-9, 12-13, 19-20, 42) A pre-trip inspection includes opening the doors of the railcar to determine whether any lubrication, cleaning or any repair is needed. The carman, while opening the doors will look for any problems that might be evident with the tracks, rollers and other components associated with the door as well as with the safety appliances that are located on the doors, to assure that everything is intact and is functioning properly. Once the door is open, inspection of the tie-downs would be made to determine if they were of specification that would be acceptable for the product to be loaded and a review of the exterior of the car would be made to make sure that the protection devices, side screens, ladders and other items are intact. Mr. Jaques testified that there are a multitude of items that would be inspected at the pre-trip inspection. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7-9, 12-13, 19-20, 42-43)

The purpose of opening the doors at the pre-trip inspection is to get the car ready to load vehicles and for inspection. Mr. Jaques explained that the door, once opened, would not have to be closed at the pre-trip inspection because the car is being made ready for loading. There would be no reason to triple the work for the individual by opening the door, closing the door and then reopening it again to make it ready for loading. Mr. Jaques testified that carmen are

pretty knowledgeable and are able to recognize if there is an impediment or some problem with the door when opening the door. If the door hung up when opening on the pre-trip one might try to close it in order to figure out what was wrong with the door or if there was a problem with the door when opening it one would look at the door further to determine what was wrong with the door. However, if there were no problems with the door, for example it did not hang-up or was not out of alignment and there did not appear to be an issue and no exception was taken to the door, one would not have to close the door at the pre-trip. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 15, 42-44)

After the pre-trip inspection in the Bristol yard in Flint, the cars are then moved to the David Road GM facility and placed in groups of four or five depending on the quantity of loading that particular day. If the multi-level railcars have not been pre-trip inspected the doors on the cars will be closed. If the cars are not pre-trip inspected or prepped at Bristol yard, then the cars would be pre-trip inspected or prepped at the loading dock. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 14, 18-19)

4. Car Inspection Procedures At David Road Loading Docks Where Incident Occurred. -

The GM plant at David Road in Flint, Michigan produces only trucks and SUVs, therefore, all auto carriers delivered at David Road for loading are bi-level railcars. Carman Doug Haskins, with whom Petitioner has worked on the day job at David Road for the three years prior to the subject incident, was Petitioner's crew member, working with Petitioner on the day of the subject incident. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27, 37, 35-36, 53)

Petitioner testified that bi-level auto railcars are delivered on the midnight shift or early in the day shift at David Road and spotted along the loading docks. The David Road loading docks have six tracks, each with the capacity of five bi-level cars. Petitioner explained that normally the cars are delivered at David Road with the doors locked open, because the cars have been pre-inspected and prepped at the prep track at the Bristol Yard in Flint. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27-28, 33, 65, 67; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 14-17)

At the David Road loading docks, it was the job of Petitioner Van Gorder and his crew member, Doug Haskins to put in bridge plates between the bi-level

cars on the A and B decks of the railcars to enable the loading of all five railcars on the six tracks at the dock. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27-28, 54; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 18-19)

Petitioner testified that there were times when the bi-level railcars, being in such demand, would arrive at the David Road loading dock without having been previously prepped and inspected. Mr. Van Gorder testified that it would be obvious which cars had not been inspected and prepped, because the doors on those railcars would be closed. If the railcars had not been inspected and prepped, it would then be Petitioner's and his crew member Haskins' job to open the doors on the cars and inspect the A and B deck for safety appliances, chocks, broken straps, etc., prior to placing in the bridge plates for loading. The actual loading of the cars would be performed by GM and/or its contractor. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27-28; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 18-19)

Once the railcars are loaded by GM and/or its contractor, Petitioner and his crew member Haskins would then inspect the cars to insure they were properly chocked and strapped down. Then Petitioner and crew member Haskins would remove the bridge plates and close the railcar doors. (R.11 Defendant's

Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 12; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 21-22)

Normally, this would proceed by the A deck carman taking down the bridge plate on B deck and then unlocking the doors from their opened, locked positions and moving the door approximately 8 to 10 inches so that it was ready to be closed. The A deck man would then get down on the ground and remove the A deck bridge plate and close doors if this was not already accomplished by the other carman. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 46; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 21-22)

5. Incident of October 17, 2003.

Petitioner Van Gorder reported for work at the David Road yard shortly before the start of the shift at 7:00 AM on October 17, 2003. The docks were loaded with railcars and some of the railcars had already been loaded with GM trucks and SUVs, with the doors closed. Petitioner testified that most of the railcars had been pre-inspected at the prep track at the Bristol Road yard, as the doors of the railcars were locked open. (R.11 Defendant's Motion

for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 53-54, 50)

Petitioner Van Gorder stated that on the day of the incident, he and crewmember carman, Haskins, worked in their normal manner, as described above. Petitioner and crew member Haskins were working on No. 4 track. They had inspected and removed bridge plates up to the No. 4 car. Petitioner could not recall how many railcars he had inspected and closed doors, prior to his injury. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 53-54)

Petitioner testified that his injury occurred at approximately 12:15 PM. Petitioner recalls that carman Haskins was walking ahead of him on the B-deck in the next or even perhaps the fifth car in Track No. 4. It was Petitioner's belief that carman Haskins had previously unlocked the open doors on railcar TTGX985596 and had them ready to close. Petitioner testified that he believes he had just completed inspecting the A-deck of the same railcar when he got down to close the doors. Petitioner was facing the A-end of railcar TTGX985596 (A-end opposite of the [brake end] of the car) and as he was facing the left clamshell door, he attempted to close the door, pulling from left to right. While attempting to close the left clamshell door he grabbed the door in his normal fashion with both hands at approximately chest level. Petitioner testified that the door initially moved freely and with no resistance. After moving the door to within approximately one and one-half to two feet

of it being closed, the door suddenly and without warning completely stopped. Petitioner stated that the door stopped so suddenly that his forward momentum caused both of his hands to slip off the end of the door and he nearly fell down. Petitioner testified that he felt a sharp pain in his right shoulder as well as in his fingers. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Petitioner, pp. 61, 64-66, 73-74)

6. Subject Railcar Was Pre-Trip Inspected – No Defects Noticed.

Petitioner did look into the track at the base of the door and could see no obstruction or anything which would have caused the door to hang up in the fashion that it did. Petitioner testified unequivocally that he did not inspect the doors of this railcar prior to attempting to close them because it had already been prepped at the prep track at Bristol Yard. Petitioner also testified that while he has experienced doors becoming "hung up" and "difficult" to close on prior occasions, he had never experienced a door becoming "hung up" as it did at the time of this incident. Petitioner testified that normally, a carman knows that he's going to have trouble with a door as soon as he attempts to open or close it, explaining that the door does not move freely, but has a problem with the movement, which is immediately noticed. In this case, on the day of the subject incident, the door of railcar TTGX985596 appeared to be moving freely and in good fashion until, without warning, it

stopped. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 113-114, 76; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 15, 43-44)

7. Post-Accident Investigation And Mechanical Inspection of Railcar TTGX985596 At The Repair In Progress (RIP) Track.

Subsequent the incident, railcar TTGX985596 was taken by the switch crew to the RIP (repair in progress) track in Flint, for mechanical inspection of the railcar. At 3:30 PM on October 17, 2003, Robert F. Miller, Car Foreman at Flint RIP track performed an inspection of the railcar along with John P. Jaques, Mechanical Department supervisor and Technical Officer – Pool Operations, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey and Risk Mitigation Officer David Cromie. (R.11 Defendant's Motion for Summary Judgment, Exhibit C, Deposition of Robert F. Miller, p. 13; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 30-34)

Initially, Mr. Miller and Mr. Jaques were unable to determine any problem with the railcar door. Inspection of the railcar from the ground level, reviewing all of the components of the door revealed nothing; there was nothing to which exception could be taken. Everything looked fine from the ground.

The mechanical inspection/investigation revealed that the AR door on the railcar was able to be opened without problems. The defect in the door manifested itself only in closing the door, by stopping, before it was able to be fully closed. The door operated properly when being opened. After a thorough investigation including being elevated over the top of the roof of the railcar in a man lift bucket, inside the repair facility Mr. Jaques deduced that the shaft of the AR door canopy bolt, which is situated between the canopy and the roof and which is not visible from any vantage point, was worn or damaged. (R.11 Defendant's Motion for Summary Judgment, Exhibit C, Deposition of Robert F. Miller, pp. 14-17, 23, Exhibit F, Mechanical Inspection Report, Exhibit G, Photographs of the car and bolt, taken upon mechanical inspection; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 34, 37-40, 46-47)

At his deposition, Mr. Jaques explained the mechanics of the clamshell door and of the top canopy bolt and how the determination was made, based upon mechanical inspection of the railcar in question, that the AR door top canopy bolt was worn. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 30-47) The railcar in question has two clamshell or radial doors. The door is attached to the roof and has a bottom roller upon which the door rides and which bears all of the weight of the door.

The door pivots at the center point, which is called the canopy. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 34) The canopy bolt looks like a flathead bolt with an Allen wrench or hexagon type hole in the top of the bolt. The bolt goes through the canopy and the roof. On the underside of the bolt there is a castle nut and a cotter pin inserts into a hole in the bottom of the bolt, which retains the nut and acts like a positive lock-nut, so that the bolt doesn't fall off. The bolt itself, *sits inside* of a large contoured washer, which looks like a bowl or a plastic cup or a sleeve and *which sits into an indentation in the canopy on the roof of the railcar*. Thus, the canopy bolt goes through the roof and the canopy. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40)

As stated previously, Mr. Jaques reviewed all of the components of the door from the ground and could find nothing to which he could take exception. When he opened the door there was no problem and he suspected nothing would happen when he closed the door, but the door would just stop in the movement when being closed. Mr. Jaques testified that there was nothing to indicate that there should have been any problem with closing the door; from the ground and looking underneath the canopy bolt he was able to see that the castle nut and cotter-pin was in place and intact. (R.14 Defendant's Reply Brief to

Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 46-47)

Mr. Jaques wanted to determine whether the canopy bolt was intact, so he got into a man lift bucket and was elevated overtop of the railcar in order to view the canopy and the top of the canopy bolt. Mr. Jaques testified that *even from the man lift, he was unable to see any problem or defect with the door or with the bolt,* because you "can't see where the bolt was worn or damaged" *because the wear on the bolt or the damage to the bolt is "sandwiched," in this case, between the canopy and the roof, at that joint, so it is not visible from any vantage point*, either from the ground, or from the top of the roof. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 46-47) Based upon his inspection and investigation, Mr. Jaques determined that the shaft of the bolt itself, located between the roof and inside the contoured washer of the canopy, "could have been worn, damaged, cut into" which, during the rotation of the bolt, during the closing of the door, caused the door to suddenly stop. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 42)

Mr. Jaques explained that the bolt was not removed at the time of the mechanical inspection/investigation because the railcar was loaded with vehicles. Mr. Jaques testified that the car was shipped to destination with large stickers on the side of the car stating "Home Shop" and stickers letting

everyone know "Be careful opening and closing this door. And it's got to be repaired," after the unloading of the railcar. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 41-42)

Thus, Mr. Jaques explained that the defect was only obvious upon failure of the bolt, when the movement of the door stopped upon closing the door. *The worn or damaged bolt could not be seen from the ground or from the top of the roof or above the roof in the man lift.* (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 46-47) Being elevated above the railcar in the man lift allowed Mr. Jaques to determine that the bolt was fully intact; enabling him to determine that the shaft of the bolt itself was damaged. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 46-47)

Mr. Jaques testified that there are ladders on all four corners of the railcar which go up to the roof rail or rail plate. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 27) Even though a carman could go up the railcar ladder safely, Mr. Jaques stated "it's not promoted" to go up that high on the ladder in order to attempt to see into the center of the railcar to where the canopy is located, which is five (5) or six (6) feet away from the side ladder, where the canopy bolt sits in a depression in the canopy on the rooftop. (R.14 Defendant's Reply Brief to Plaintiff's

Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 42)

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Correctly Applied The Evidence In The Record To Well-Established Legal Standards Relative To Judgment As A Matter Of Law Pursuant To Fed. R. Civ. P. 56(c) And The FELA, 45 U.S.C. §51, In Its De Novo Review Affirming The District Court's Grant Of Summary Judgment To Respondent

A. Petitioner Fails To Present Any Conflict In The Decision Below And Any Decision of this Court or of a Court of Appeals and Has Not Met His Burden of Demonstrating Compelling Reasons For The Petition to be Granted.

Petitioner argues that the Court of Appeals for the Sixth Circuit's decision affirming the order of summary judgment in favor of Respondent Grand Trunk is in conflict with another Sixth Circuit decision, *Aparacio v. Norfolk & W. Ry.*, 84 F.3d 803 (6th Cir. 1996) with respect to the standard governing the quantum of evidence a plaintiff in a Federal Employer's Liability Act (FELA), 45 U.S.C. §51 *et seq.*, case must present, being more than a scintilla of evidence, in order to withstand a motion for judgment as a matter of law. While having made this statement, Petitioner does not set forth the manner in

which the law or legal analysis of the lower court is in conflict with *Aparicio*. Petitioner also claims that the lower court's decision in *Van Gorder* is in conflict with "opinions of the Supreme Court," without stating the decisions of this Court which he claims conflict with the lower court's decision in this case. No further elaboration of the alleged conflict in the decision below or any decision of this Court or of a Court of Appeals is provided to this Court by Petitioner in the Petition.

Petitioner goes on to argue, in essence, the importance of the right to a trial by jury and that the Sixth Circuit's decision in Van Gorder was in error in holding that Petitioner presented no evidence from which a jury could find that the Respondent Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railroad cars or that its method of pre-trip inspection of the cars was unreasonable and that Petitioner had failed to present evidence that the Respondent Grand Trunk was negligent and thus, granting judgment in favor of the Respondent as a matter of law, pursuant to Fed. R. Civ. P. 56(c). Petitioner argues that the lower court's finding that there was no genuine issue of material fact for a jury regarding the reasonableness of Grand Trunk's inspection "puts this decision in conflict with *Aparicio* and other Sixth Circuit cases" and hysterically argues the lower court's finding that the record did not contain sufficient evidence to go to a jury "establishes a new non-jury standard under the FELA" (Petition p. 9, 14) It is apparent that the

Petitioner is begging for a factual reanalysis of the case, while attempting to disguise his plea as a legal dilemma.

Two courts have reviewed all of the evidence in the record and have held that the evidence of record in the case at bar is insufficient to preserve a genuine issue of material fact relative to an element of Petitioner Van Gorder's claim that Respondent Grand Trunk was negligent in its inspection of the car door. Unsatisfied with this outcome, Van Gorder has Petitioned this Court for review arguing that the lower court is in error in its factual finding that "Van Gorder has not presented evidence and the record does not contain evidence sufficient to permit a reasonable jury to find" Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railcars or that its method of pre-trip inspection of the cars was unreasonable. An analysis of the Petition does not reveal any law or argument demonstrating that the lower court's decision is in conflict with the decision of another United States court of appeals on the same important matter nor does the Petitioner claim that the Sixth Circuit's ruling implicates an important federal question that has not been settled by this Court. Sup. Ct. R. 10.

Petitioner is asking this Court to conduct a *de novo* review of the evidence on record, as the lower court did. The Petitioner's argument goes only to alleged errors in the factual findings of the lower court. It is Respondent's position that the lower court, after having conducted a rigorous analysis of the

record as demonstrated by its Opinion, *Van Gorder, supra,* (Petitioner App. A, 1a-13a), has correctly applied well-established law to the evidence on record in this case and has not committed any error in affirming the grant of summary judgment in favor of the Respondent. Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted by this Court as Petitioner's argument is, at best, a claim of error by the lower court in its factual findings or application of properly stated rules of law. Sup. Ct. R. 10.

B. The Evidence On Record Is Not Sufficient to Preserve A Genuine Issue of Fact Material To An Essential Element of Petitioner's Claim of Negligence; Namely, that Respondent Was Negligent In Its Inspection of The Door Of The Railcar.

Petitioner makes the same arguments on Petition as he did in the lower courts relative to the sufficiency of the evidence on record.

1. The Lower Court Reviewed All Of The Evidence In The Record Including The Petitioner's Testimony And Arguments In Addition To The Affidavit Of Michael Micek And Correctly Held The Evidence Insufficient To Permit A Reasonable Jury To Find Grand Trunk's Method Of Pre-Trip Inspection Of The Cars Unreasonable.

Petitioner argues the lower court erred because it did not consider all of the evidence in the record claiming that the lower court chose to overlook or mistakenly ignored the testimony of the Petitioner when making its determination that there was no genuine issue of material fact to be decided by the jury on an essential element of Petitioner's claim of negligence. Petitioner's argument is without merit. Petitioner argues as he did in the lower court: 1) there is a question of fact as to whether the pre-trip inspection took place; 2) that the testimony of the Petitioner created a question of fact with respect to pre-trip inspection procedures arguing that Petitioner's testimony stands for the proposition that "opening and closing of the clamshell doors was customary in inspecting railcars"; and 3) argues Grand Trunk's failure to require the closing of the doors at the pre-trip inspection made the pre-trip inspection unreasonable.

All of the evidence on record, including the testimony of the Petitioner establishes that the pre-trip inspection took place. As set forth in the Statement of Facts, Respondent's employees, Petitioner's supervisors, Mr. Miller and Mr. Jaques, as well as Petitioner, testified as to the Respondent's inspection procedures and standards in the normal course of the Respondent's business at the Flint yard and loading docks at issue. Petitioner also testified that at the time of the incident that the railcars had been pre-inspected with the doors locked open. If the doors had not been pre-inspected with the doors locked open, he would have performed the pre-trip inspection on the railcar at the loading docks, which Petitioner testified was not necessary on the day of the incident, because the pre-trip inspection had taken place. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 67, 27-28) Petitioner did not present any evidence to rebut Petitioner's testimony that the railcar in question had been pre-inspected prior to being delivered to the loading dock where Petitioner was working at the time of the incident.

The argument that Petitioner's testimony with regard to pre-trip inspection procedures created a question of fact, asserting that Petitioner's testimony stands for the proposition that "opening and closing of the clamshell doors was customary in inspecting railcars" is a misleading and inaccurate characterization of the Petitioner's testimony when viewed in its entirety. Petitioner testified that there were times

when the bi-level railcars would arrive at the David Road loading dock without having been previously prepped and inspected, as the doors on the railcars would be closed. If the railcars had not been inspected and prepped it would then be Petitioner and his crew member's job to perform both the pre-trip inspection, which would require them to open the doors on the railcars and inspect the cars, as well as their usual inspection after the cars were loaded by GM and/or its contractor, which would require inspection and closing of the railcar doors. Thus, in performing both of these functions Petitioner is *opening and closing* the doors. Petitioner has not testified that it was the custom and procedure on a pre-trip inspection to open the closed door, then close the door and then open the door once again in preparation for loading of the car.

In addition, the un-rebutted evidence in the record is that there was a defect in the door in question which manifested itself upon the canopy bolt's failure at the time of the accident. Thus, the first notice to the Respondent of the defect in the railcar was upon the failure of the bolt, when Petitioner closed the door at the time of the incident. Assuming arguendo that the pre-trip inspection included opening the closed doors, then closing the doors and then opening the doors once again, in preparation for the cars to be loaded, as Petitioner argues, this does not create a question of fact or dispute of fact as to the Respondent's actual or constructive knowledge of the defect in the door prior to the incident. It does not demonstrate that Respondent could have discovered

the defect in the railcar upon inspection, prior to the incident.

Contrary to Petitioner's argument, all of the evidence, including these issues and testimony was addressed by the lower court in its Opinion. The lower court did not choose to overlook or mistakenly ignore the Petitioner's testimony on this point, as Petitioner suggests. Plainly Petitioner has not thoroughly reviewed the lower court's Opinion, since Petitioner claims the lower court "inexplicably" failed to mention Petitioner's testimony in its decision. The lower court analyzed the entire record and spoke to these points, *Van Gorder, supra,* at pp. 270-271, (Petitioner App. A, 11a-12a) and correctly held as follows:

> Van Gorder next claims that Grand Trunk merely had to close the door to discover the defect; that closing the doors during the pre-trip inspection would be very easy for Grand Trunk; and that failure to do so made the pre-trip inspection unreasonable. We need not decide what might be easy for the railroad, nor need we indulge Grand Trunk's hypothetical assertions that, in this case, closing the door during the pre-trip inspection might simply "have provided us with a different plaintiff." We must decide only whether Grand Trunk conducted a reasonable inspection and exercised ordinary care. Van Gorder has not presented evidence and the record does not contain evidence sufficient to permit a reasonable jury to find that

Grand Trunk's failure to require closing the door as part of the pre-trip inspection of the car made that inspection unreasonable.

Jacques testified that the pre-trip inspectors would ordinarily recognize a problem with the door upon opening it. Van Gorder himself testified that he had never encountered a door with a defect like the one in question, and that if a door were going to be defective, he "would usually know in the first few inches" of closing it. Van Gorder agreed that the door in question was unusual, and he presented no evidence that Grand Trunk knew or had reason to know of the particular defect in the door or that such a defect would cause the injury Van Gorder sustained. In short, Van Gorder presented no evidence from which a jury could find that Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railroad cars, or that its method of pre-trip inspection of the cars was unreasonable.

2. The Lower Court Correctly Found The Affidavit Of Michael Micek Provided No Specific Information To Explain Why Grand Trunk's Inspection Was Not Reasonable And Provided No Evidence To Dispute Grand Trunk's Specific First-Hand Testimony That The Defective Bolt Was Not Visible From Any Angle.

Petitioner next argues that the lower court erred in not considering his expert witness Michael Micek's "vast experience and qualifications" as an expert, as set forth in his affidavit, and claims that the Respondent did not challenge Mr. Micek's credentials. While Mr. Micek may well have vast experience and qualifications as an inspector and equipment supervisor for the Federal Railroad Administration, the record was devoid of any evidence that Mr. Micek has any personal knowledge of: the type or design of the railcar in question, the mechanics of the door of the subject railcar, or of the canopy on the roof of the railcar, and/or the canopy bolt, or even as to the size of the railcar. There is no foundational support in the affidavit of Mr. Micek on any of these points nor is there any foundational support to indicate that Mr. Micek had ever examined the railcar in question or an exemplar railcar. Respondent challenged the affidavit of Mr. Micek on all of these points in the lower court.

The lower court's reference to Michael Micek as a "purported expert" in this case goes to the heart of his

qualifications to testify regarding the specific issues as to the subject railcar and is not a credibility determination. It was not error for the lower court to find that Mr. Micek's affidavit did not create a question of fact for the jury on the issue of Respondent's negligence.

Petitioner further argues to this Court, as he did in the lower court, that Mr. Micek, in his Affidavit, Paragraph 9, opines that an inspection of this car could have been done without the use of a manlift and that the Defendant could have climbed the side ladder to the very top in order to view the top of the AR door canopy bolt. (R.13 Plaintiff's Response Brief in Opposition to Defendant's Motion for Summary Judgment, Exhibit G, Affidavit of Michael Micek, pp. 2-3) In the first place, as set forth in the Statement of Facts, Mr. Jaques testified that the manlift was used inside the repair facility in order to view the top of the canopy bolt in order to determine whether the canopy bolt was still intact. There is no evidence in the record that a manlift was used for inspection of railcars outside of the repair facility. This statement by Mr. Micek does not go to the Respondent's inspections prior to the incident.

Secondly, the fact that one can possibly climb the side ladder of the railcar to the very top in order to attempt to view the top of the canopy bolt on the railcar, again, does not create a question of fact or dispute as to the inspection procedures and standards used by the Defendant at the time of the incident, nor does it create thereby a question of fact as to whether

the Defendant knew or should have known of the defect in the canopy bolt prior to the incident in question.

As set forth in the Statement of Facts, the testimony of Mr. Jaques was that even having viewed the top of the canopy bolt from a manlift, elevated above the roof of the railcar, inside the repair facility, he was unable to see any problem or defect with the door or with the canopy bolt. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 45-47) Thus, even if one did climb to the top of the ladder up to the roof, in order to attempt to view the top of the canopy bolt on the roof of the railcar, it would *not* have revealed the defect in the canopy bolt as occurred upon the facts of this case. Mr. Micek's Affidavit does not create a question of fact on any of these points, contrary to Petitioner's argument.

Petitioner also argues to this Court as he did in the lower court, that the testimony of Mr. Jaques confirms Mr. Micek's alleged assessment in his Affidavit that "if the car inspectors had gone on top of the roof, they would have also noticed this defective bolt." This argument is a blatant misrepresentation of Mr. Jaques' testimony. Mr. Jaques testified that he was unable to see any problem or defect in the canopy bolt when elevated in the manlift above the roof or from the ground level or from any vantage point. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 45-47) Contrary to Petitioner's argument,

Petitioner has not presented any evidence that the defect in the door at issue could have been detected through "alternate means" nor does Mr. Micek's affidavit create questions of fact regarding any proposed allegedly proper means and methods of the prior inspections.

The lower court properly held the Affidavit of Michael Micek does not present any evidence that the Defendant knew or should have known of the defect in the subject railcar prior to the incident. In its Opinion, the lower court notes that the Affidavit makes only conclusory statements and does not set forth any counter standard or method or procedure by which the Defendant's conduct is to be measured.

Petitioner argues that the conclusory statement of Paragraph 7 of Mr. Micek's Affidavit that had the Respondent "conducted thorough and proper inspections of said car, it should have discovered that the AR door top canopy bolt on car TTGX985596 was defective as it was worn," stating that wear and tear occurs over time and does not spontaneously occur. Similarly, in paragraph 9 of Mr. Micek's Affidavit he states conclusorily that the Respondent "Grand Trunk knew or should have known prior to Mr. Van Gorder's accident that the subject car TTGX985596 was defective." These conclusory statements by Petitioner's expert in his Affidavit do not present any evidence that the Respondent knew or should have known of the defect in the clamshell door canopy bolt prior to the incident in question. The conclusory allegations in Mr. Micek's Affidavit do not go beyond

the mere allegations of the complaint and must be disregarded in determining a motion for summary judgment. *Zenith Vinyl Fabrics Corp. v. Ford Motor Company*, 357 F.Supp. 133, 138-139 (E.D. Mich. 1973),

The lower court in analyzing the points raised by Petitioner on his Writ relative to the affidavit of his expert witness Michael Micek correctly found:

> In attempting to prove that Grand Trunk's pre-trip inspections were unreasonable, Van Gorder relies almost exclusively on the sworn affidavit of his purported expert, Michael Micek ("Micek"). But Micek did not inspect the door of the railroad car at issue, nor does he state in his affidavit that he has any particular familiarity with either the type of car or the type of door at issue. He fails to point to any standard of care to which Grand Trunk failed to conform and he does not explain what kind of inspection would have been reasonable. Micek's affidavit simply makes the conclusory statement that Grand Trunk did not act reasonably because in its pre-trip inspections, it did not discover the defective bolt.
>
> Van Gorder first claims that Grand Trunk would have discovered the defect if it had viewed the door from the roof of the railcar. In his affidavit, Micek claims that Grand Trunk employees could have climbed the ladder on the side of the rail car to its "upper most height" and seen the defect in the bolt. But Micek did not actually see the car, or

> climb the ladder. Jacques – who personally inspected the car – testified at his deposition that he could not see the defect in the bolt either from above the car or from the ground below. * * *
>
> Most significant here, however, was Micek's inability to explain what would have constituted a proper inspection. Micek provided no specific information to explain why Grand Trunk's inspection was not reasonable. He provided no evidence to dispute Grand Trunk's specific, first-hand testimony that the defective bolt was not visible from any angle, and that to observe the defect, Grand Trunk had to take the door apart. Van Gorder cannot raise a genuine issue of fact regarding the reasonableness of Grand Trunk's inspection by suggesting that it should have used a different method to perform the inspection, when the method he advocates would not have revealed the defect that led to his injury.

Van Gorder at 270 (Petitioner App. A, 9a-11a)

The lower court did not err in finding that the evidence in the record was not sufficient to "preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door." *Van Gorder* at 271, (Petitioner App. A, 12a) Petitioner has failed to establish that the lower court has made erroneous factual findings. Petitioner has not met its burden pursuant to Sup. Ct. R. 10 of demonstrating any

"compelling reasons" for the Petition to be granted by this Court.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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